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No. 83-385

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARLENE GRATCHNER CLARK, PETITIONER

v.

ELIZABETH HANSFORD DOLE, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in awarding costs in favor of the government.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is reported at 713 F.2d 864 (mem.).

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1983. The petition for a writ of certiorari was filed on September 6, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a civilian employee of the Federal Aviation Administration, brought this action under Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e-16, and the Equal Pay Act of 1963, 29 U.S.C. 206(d). Following an 11-day bench trial, the district court dismissed petitioner's claims with prejudice (Pet. App. 49a).

In a written opinion the court extensively reviewed the evidence at trial (*id.* at 13a-42a) and found, among other things, "that the testimony offered by the agency was generally far more credible than that offered by [petitioner]" (*id.* at 33a) and that petitioner's "direct[,] cross and rebuttal testimony appeared to be tangled with the truth" (*id.* at 41a). After "weigh[ing] and assess[ing] the credibility of [petitioner], her various witness[e]s and the several persons testifying for the FAA" (*id.* at 12a-13a), the court concluded that the "clear preponderance of testimony demonstrates that [petitioner] was not discriminated against because of her sex and that she does not have a valid Equal Pay Act claim" (*id.* at 13a). In particular, with respect to the Title VII claim, the court held that petitioner "has failed to establish a *prima facie* case of discrimination" and did not show "that the stated nondiscriminatory reasons for disciplinary action and non-promotion were merely pretexts for unlawful discrimination" (*id.* at 43a). Likewise, the court held that petitioner "has failed to make out a *prima facie* showing" on her Equal Pay Act claim (*id.* at 46a).

Following entry of judgment against petitioner, respondent as the prevailing party filed a bill of costs pursuant to Fed. R. Civ. P. 54(d). Petitioner objected to the amounts and types of costs requested by the government and also argued that the Department of Justice had a policy against seeking costs in Title VII actions by federal employees unless the suit had been brought in bad faith, was pursued in a harassing or vexatious manner, or was patently groundless or frivolous.

The district court awarded costs relating to transcripts and depositions, but declined to order reimbursement attributable to the fees and expenses of two government witnesses (Pet. App. 3a-6a). In making this award, the court was mindful that "Congress intended Title VII proceedings

to act as a vehicle in eliminating discrimination in employment and that charging litigation costs may discourage litigants from bringing meritorious claims" (*id.* at 4a). The court also noted that "[w]hile [petitioner's] claims in this proceeding were certainly not well supported, they were not completely frivolous" (*ibid.*). In light of these considerations, the district court, exercising its discretion under Fed. R. Civ. P. 54(d), made a partial award of costs in favor of the government. Thereafter, the court denied petitioner's motion to alter or amend the award of costs (Pet. App. 7a-9a).

Petitioner did not appeal the dismissal of her case on the merits. However, she did seek review of the issue of costs. The court of appeals rejected her contentions and affirmed the order of the district court (Pet. App. 1a-2a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the other courts of appeals. Accordingly, further review is not warranted.

Petitioner does not challenge the district court's exercise of discretion under traditional standards applicable to Rule 54(d). See, *e.g., Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 351-352 (1981). Rather, she contends (Pet. 17-20) that a different rule should apply in Title VII litigation that would limit the availability of costs in favor of the defendant—and especially the federal government — as the prevailing party. As petitioner recognizes (Pet. 18 & n.5), the courts of appeals that have considered the issue are in agreement that no special rule of costs is applicable to prevailing Title VII defendants, including the government. See *Poe* v. *John Deere Co.*, 695 F.2d 1103, 1108 (8th Cir. 1982); *NOW* v. *Bank of California*, 680 F.2d 1291, 1294 (9th Cir. 1982); *Montgomery* v. *Yellow Freight System, Inc.*, 671 F.2d 412,

413 (10th Cir. 1982); *Allen* v. *United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982); *Croker* v. *Boeing Co.*, 662 F.2d 975, 998-999 (3d Cir. 1981); *Danner* v. *United States Civil Service Commission*, 635 F.2d 427, 433 (5th Cir. 1981); *Johnson* v. *Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d 1279, 1282 (8th Cir.), cert. denied, 449 U.S. 1042 (1980). This conclusion is fully consistent with the plain and unqualified language of Rule 54, which contains no exception for Title VII litigation. See *Croker* v. *Boeing Co.*, 662 F.2d at 998.

Contrary to petitioner's reliance (Pet. 17, 19) on *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), the issue of costs presented in this case is far different from that of attorney's fees. As the en banc District of Columbia Circuit has recently explained:

> Unlike attorneys' fees, whose magnitude and unpredictability have discouraged parties with otherwise meritorious claims from litigation, the small and predictable costs of court fees, printing costs, and court reporters' fees have customarily been viewed as necessary and reasonable incidents of litigation, properly reimbursable to the victors.

Baez v. *United States Department of Justice*, 684 F.2d 999, 1003 (1982) (footnotes omitted). The above decisions of the courts of appeals have correctly recognized that Title VII does not create by implication an exemption from Rule 54(d) or immunize an unsuccessful plaintiff from the "liability for costs [that] is a normal incident of defeat" (*Delta Air Lines, Inc.* v. *August*, 450 U.S. at 352).[1]

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[1]In addition, the district court exercised its discretion in this case with full awareness of the need not to allow the award of costs to discourage the prosecution of meritorious Title VII suits. See pages 2-3, *supra*; compare *Christiansburg*, 434 U.S. at 418-419. Nor did the district court engage in the "*post-hoc* reasoning [of] concluding that, because a plaintiff did not ultimately prevail, [the] action must have been

Nor were costs impermissible here, as petitioner argues (Pet. 20-27), because the Department of Justice had a policy against "automatically" or " 'mechanical[ly]' " (Pet. App. 57a) seeking costs from unsuccessful Title VII plaintiffs.[2] The internal memorandum upon which petitioner relies represents a statement of Department policy that does not have the force of law or confer enforceable rights on third parties. See *United States* v. *Caceres*, 440 U.S. 741 (1979); *Independent Meat Packers Association* v. *Butz*, 526 F.2d 228, 229, 236 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976); *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965), cert. denied, 382 U.S. 978 (1966). Accordingly, even if we assume for present purposes that the policy would not have supported a request for costs in this case and that petitioner had relied on the policy in pursuing her lawsuit, it did not bar the district court's award of costs or work an estoppel against the government.[3]

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unreasonable or without foundation" (434 U.S. at 421-422). To the contrary, here petitioner's claim, while perhaps "not completely frivolous," was "certainly not well supported" (Pet. App. 4a). In these circumstances the granting of costs to the defendant would not threaten to deter legitimate — even if ultimately unsuccessful — lawsuits. See *Sun Ship, Inc.* v. *Lehman*, 655 F.2d 1311, 1316 (D.C. Cir. 1981).

[2]As petitioner acknowledges (Pet. 14-16, 22), this policy has been rescinded and is no longer in effect (see Pet. App. 59a-62a). Accordingly, this issue will not continue to arise in the future. Moreover, the consequences of the policy for past lawsuits — many of which have long been concluded — is not of sufficient importance to call for this Court's attention.

[3]The Department's policy provided that costs should not be sought unless, inter alia, the plaintiff's claim "was patently groundless or frivolous," which was illustrated to mean that the plaintiff was not "able to establish a *prima facie* case," did not raise a claim "based on a novel legal theory," or did not "abandon[] a frivolous suit promptly after the discovery of the facts that demonstrate its baselessness" (Pet. App. 58c). As discussed above, petitioner failed to make out a prima facie case on either of her causes of action, did not present a novel legal theory, and pursued her claims to a final judgment that entailed an 11-day trial on the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

DECEMBER 1983

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